Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RANDELL P. MEANS,
Assistant United States Attorney,
in his individual capacity,
Petitioner,

v.

BRENDA CHILCUTT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 21, 1994

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QUESTION PRESENTED

Whether the court of appeals engaged in improper appellate fact-finding—doing grievous harm to the reputation of petitioner, an Assistant United States Attorney—in finding that petitioner "intentionally withheld documents" and "knowingly engaged in blatant misrepresentations to the district court about the existence of those documents," when the district court, after an evidentiary hearing, declined to make such findings.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, respondents include Home Indemnity Company, appellee below, and the United States of America, appellant below, which is a respondent under this Court's Rule 12.4.

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Randell P. Means, in his individual capacity, hereby petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-30a) is reported at 4 F.3d 1313. The following orders of the district court are not reported: the May 26, 1992 order compelling discovery (App. 31a-34a); the June 2, 1992 order setting the amount of sanctions and ordering petitioner not to seek reimbursement from the Department of Justice (App. 35a-36a); the June 4, 1992 order sanctioning the United States (App. 37a-38a); the June 6, 1992

order denying a stay of execution (App. 39a-43a); the July 1, 1992 order scheduling a preliminary hearing concerning possible issuance of a show cause order (App. 44a-52a); and the July 28, 1992 order sanctioning petitioner Randell P. Means (App. 53a-54a). The order of the court of appeals denying petitioner's petition for rehearing, entered on December 22, 1993, (App. 55a) is not published. The transcript of the July 28, 1992, hearing is appended hereto (App. 56a-119a).

JURISDICTION

The court of appeals rendered its opinion on October 25, 1993. A petition for rehearing was denied on December 22, 1993. On March 16, 1994, Justice Scalia extended the time for the filing of a petition for a writ of certiorari until April 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case presents an extraordinary instance of impermissible appellate fact-finding by the court of appeals, which will result in irreparable harm to the reputation of an Assistant United States Attorney unless corrected by this Court. In affirming an order permanently enjoining petitioner from applying under 28 C.F.R. § 50.15(c)(1) for reimbursement of an award of discovery costs under Fed. R. Civ. P. 37(d), the court of appeals repeatedly resolved factual disputes that the district court—after observing the witnesses—failed to resolve or resolved contrary to the conclusion reached by the court of appeals. As a result of its improper usurpation of the district court's role, the court of appeals decided this case on an incorrect basis. The legal error in the scope of appellate review is so manifest, and its conflict with the controlling standards established by this Court so stark, that this Court should summarily reverse the judgment of the court of appeals and remand the case for further proceedings.

1. *Proceedings Before the District Court.* On October 4, 1988, respondent Brenda Chilcutt [1] fell and was injured while she was a patron at the River Bend Post Office in Fort Worth, Texas. She and her workers' compensation insurer, respondent Home Indemnity Company, unsuccessfully pursued administrative claims with the United States Postal Service, and, in April 1991, filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2401 *et seq.*[2] The action was brought in the United States District Court for the Northern District of Texas, and was assigned to United States District Judge John H. McBryde. Chilcutt alleged that her fall and injuries were due to negligence on the part of the United States in failing to maintain the floor of the post office in a safe condition, including allowing it to remain wet.

a. Petitioner, Randell P. Means, an Assistant United States Attorney employed in the Northern District of Texas, was assigned to defend the case on behalf of the United States. He has been an AUSA since 1987 and during that time he has tried more than 20 cases for the United States. Prior to joining the U.S. Attorney's office, petitioner had been a state prosecutor for more than seven years and had tried more than 50 criminal cases in state court. During all of that time, with the exception of this case, he has never been sanctioned by any court and has never had an ethical complaint lodged against him. At the time of this litigation, petitioner was responsible for approximately 100 other cases.

The district court entered a scheduling order setting a discovery cut-off date of May 8, 1992, and a trial date of June 8, 1992. Plaintiffs undertook no discovery until

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[1] Since the outset of this litigation, Brenda Chilcutt was married, and she has taken the name Brenda Wortham. For the sake of convenience, we refer to her as Brenda Chilcutt.

[2] The United States, the named defendant below, has not filed a petition for a writ of certiorari on its own behalf, and is therefore a respondent in this Court under S. Ct. Rule 12.4.

March 24, 1992, when they served a set of interrogatories and requests for production of documents on the United States. The government's responses were due on April 23, 1992, about two weeks before the court-imposed discovery deadline. On May 19, 1992, after petitioner failed to respond to the pending discovery request in a timely fashion, plaintiffs filed a motion to compel discovery and for sanctions under Fed. R. Civ. P. 37. As a sanction, plaintiffs sought the imposition of a default judgment.

The district court scheduled a hearing on that motion for May 22, 1992. Between the May 19 motion and the May 22 hearing, petitioner produced relevant documents and served answers to plaintiffs' interrogatories. Plaintiffs' counsel, Kelly Robbins, remained dissatisfied with the government's response to her discovery requests. Robbins complained that the government had failed to produce all the requested documents and had given incomplete interrogatory answers.

When asked to explain why there had not been timely compliance with discovery, petitioner stated that it was due to a "combination" of the Postal Service not having provided the information and documents quickly enough and petitioner's own fault in failing to respond with the incomplete information he had. Petitioner also explained that much of the information sought by plaintiffs' March 24, 1992 discovery requests had effectively been provided to plaintiffs in a timely fashion when Postal Service investigator Al Svede was deposed on April 22, both through Svede's testimony and in response to a subpoena *duces tecum* that he complied with at that time. 5/22/92 Tr. 28-31.

At the conclusion of the May 22 hearing, the district court ordered the government to produce by no later than May 27 all the documents requested by plaintiffs. App. 33a.[3] In addition, the district court ordered petitioner

[3] In addition, the court ordered petitioner to arrange for plaintiffs to depose an independent contractor who was responsible for

personally to file an affidavit stating that the documents he had produced constitute all the responsive documents within the government's possession and control. *Id.* at 33a-34a. The court also ordered petitioner to certify that he had made inquiries of Postal Service employees and agents that were calculated to disclose the existence of all documents responsive to the plaintiffs' document requests. *Id.* at 34a.

Turning to plaintiffs' motion for sanctions, the court deferred ruling on the request for a default judgment. *Id.* at 35a. Due to "the government's failure to respond to discovery," however, the court ordered petitioner to pay the costs and attorney's fees incurred by plaintiffs in connection with the motion to compel, as well as with regard to the deposition of the independent contractor. 5/22/92 Tr. 38. The court expressly relied only on Rule 37(d). Although the court made no findings concerning the relative fault of the Postal Service and petitioner with respect to the discovery lapses, the court ordered the plaintiffs' expenses reimbursed and that they be paid by petitioner *personally*, and not by the government. The sole rationale offered by the court—at that time or any other point throughout the litigation—for that part of its order was its conclusion "that this sort of thing should [not] be borne by the taxpayers." *Id.*[4] Because plaintiffs' counsel,

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the care and maintenance of the floors at the River Bend Post Office. App. 34a. Petitioner had not interviewed the independent contractor prior to answering plaintiffs' interrogatories, and had therefore responded to certain of plaintiffs' interrogatories by stating that information within the contractor's possesson was not yet known. Although the independent contractor was not an employee of the Postal Service, and was therefore equally accessible to plaintiffs' counsel, the court concluded that it was petitioner's responsibility to interview her before responding to plaintiffs' interrogatories. *See* 5/22/92 Tr. 10-16.

[4] On June 6, 1992, the court entered an opinion and order denying the government's motion for a stay of the order that petitioner pay the sanctions personally, and in that opinion the court reiterated—

Robbins, had not had time fully to digest the discovery responses provided by the government to that point, the court invited her to file a supplemental motion to compel or for sanctions if she remained dissatisfied with the government's production. *Id.* at 36.[5] On May 27, the government responded further to plaintiffs' discovery requests. In addition, petitioner filed an affidavit certifying that he had produced all the responsive documents, and had made an investigation calculated to lead to the discovery of all such documents within the government's custody or control.

On June 1, 1992, the court held a hearing to set the amount of the fees that it awarded to plaintiffs at the May 22 hearing. The court concluded that $2500 was appropriate, and ordered petitioner to pay that amount to plaintiffs' counsel. The court also ordered petitioner to execute an affidavit stating that the payment was "being made with his personal funds and that he has not sought, and will not seek, receive or accept, reimbursement from the United States government for the payment he makes." 6/1/92 Tr. 23.[6] Finally, the court noted that it was "holding in abeyance the matter of sanctions to impose on the defendant." *Id.*

b. Two documents are central to an understanding of the appellate fact findings in this case. The first is a log of accidents at post offices maintained by Svede, the acci-

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but did expand upon—its taxpayer-protective rationale for that part of its sanctions order. *See* App. 41a-43a.

[5] The district court's oral rulings were memorialized in an order dated May 26, 1992. App. 33a.

[6] Pursuant to Department of Justice policy, *see* 28 C.F.R. § 50.15, petitioner sought and obtained government counsel to represent him at the June 1 hearing. The district court expressed displeasure at the fact that petitioner was represented by government counsel, and instructed the Department of Justice to file a statement detailing the costs to the government of providing petitioner with counsel. 6/1/92 Tr. 12-13, 15-16. The government provided such a statement, but the court took no further action on the point.

dent investigator employed by the Postal Service who was involved in investigating Chilcutt's accident. A copy of that log, which in its original form consisted of two oversized pages, is reproduced in the appendix for the Court's convenience. App. 120a. The second is a Form 1769, which is an accident report form that plaintiff Chilcutt claimed that she had filled out after her accident and submitted to Iona Smith, a postal employee at the River Bend Post Office. Smith testified specifically that she never gave Chilcutt any Form 1769 to fill out and that Smith never received such a form from her. 6/4/92 Tr. 85-86.

On June 1, 1992, plaintiffs, believing that the Postal Service possessed the Form 1769 and accident logs referring to the accident in question, filed a supplemental motion to compel production of these documents and other discovery materials and for sanctions. On June 3, petitioner filed a lengthy and detailed response to this motion. Among other arguments, the response denied the existence of the Form 1769 and, referring to plaintiffs' "complain[t] that Al Svede has not produced his own log," stated that "[d]efendant has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's [document] request." App. 7a n.11 (quoting Defendant's Response: Plaintiff's Supplemental Motion for Sanctions). On June 4, the district court held a hearing on the motions. Although the district court rejected many of plaintiffs' complaints as "nit-picking," the court had questions about the government's failure to produce Svede's accident log and its failure to produce a copy of Chilcutt's Form 1769. *Id.* at 31, 36-37, 39, 50-51, 60-61.

At the hearing, during the morning of June 4, petitioner represented to the district court that the Postal Service's accident logs contained no reference to Chilcutt's fall, nor to any other accidents at the River Bend Post Office. That representation was based on repeated conversations petitioner had with Svede, who was designated

as the representative of the United States in the litigation. The only accident logs that had been provided to petitioner were Safety Office logs maintained by Robert Kunkel, another Postal Service employee. Petitioner had personally inspected the Kunkel logs, and determined that they did not refer to the Chilcutt fall or to any other accident at the River Bend Post Office. During the morning part of the June 4 hearing, all of petitioner's references to "logs" referred to Kunkel's. App. 65a-68a, 76a-78a, 82a-83a, 87a-88a. At that point, petitioner was unaware of a separate log maintained by Svede. See *infra* p. 12. Because petitioner believed that the Kunkel logs were the only accident logs in existence and because he had examined those logs and verified that they contained no information responsive to plaintiffs' document requests, petitioner stated to the court unequivocally that the government had fully complied with its discovery obligation.

Portions of petitioners' representations to the trial court on the morning of June 4 are quoted at length in footnote 12 of the court of appeals' opinion (App. 7a), and formed the basis for that court's mistaken factual finding that petitioner must have been referring to, and must have personally reviewed, the Svede logs in making what the court concluded were misrepresentations to the district court. After observing that "Means stated that he had checked the log in question," the court of appeals quoted his statement that "there is no record in those logs relating to any accident or complaint on the premises of River Bend for the time—", at which point the district court interrupted petitioner. Continuing, the court of appeals quoted petitioner (App. 8a (italics and brackets supplied by court of appeals)):

> *I am stating under oath before the court as an officer of the court . . . that a search of that log has been conducted, and no accident has been identified to the time periods in that log—and I believe it's 1987 through the present—for the premises, River Bend [post office], for both employee accidents or complaints or customers accidents.*

The contents of the Svede log (App. 120a), however, reveal that it covers only accidents occurring between "10/7/88" through "9/7/89." In fact, only the Kunkel logs—and not the Svede logs—cover accidents reported "for the time period 1987 through the present." R. 436.

At the end of the morning hearing on June 4, the district court decided to hear testimony directly from government witnesses regarding the existence of the disputed documents, and ordered petitioner to produce Iona Smith and Al Svede to testify concerning these documents after the lunch break. Svede was contacted in his office at work and was told to come to court and to bring any documents he had. When Svede arrived he brought with him a second log of post office accidents that had been in a filing cabinet in his office. During the lunch break on June 4 was the first time petitioner became aware that Svede had kept a separate accident log. App. 71a-73a, 81a-83a.[7]

At the June 4 hearing, Svede informed the district court that he had brought with him his own accident log, which listed the Chilcutt accident (although it contained no other reports of accidents at River Bend). App. 120a. Svede also initially testified that he had seen a copy of Chilcutt's Form 1769, but could not locate it. 6/4/92 Tr. 93. Later during the same hearing, Svede testified that he was unsure whether he had ever seen the form and, in any event, could not now produce it. *Id.* at 100. Iona Smith testified that she never gave Chilcutt any Form 1769 and

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[7] The district court was skeptical of this fact, because Svede had made off-hand references to "my log" during his deposition. Petitioner believed, however, "based upon the answer provided by Al Svede," as stated in the aforementioned June 3 response to the sanctions motion, that there was no log containing a "record of any [accident] complaint of the type sought by Plaintiff's request." R. 436. He also believed that there was only one set of accident logs maintained by the Postal Service Safety Office—the Kunkel logs—and that Svede's statements were merely his references as a postal employee to that set of logs.

that Chilcutt never turned in a Form 1769 to her. *Id.* at 85-86.

After all the testimony was concluded, the court asked petitioner why the Svede logs had not previously been produced. According to the court of appeals, "Mr. Means merely asserted that he did not believe that the log was covered by the requests for production." App. 9a n.14. In fact, the transcript reveals the following initial response: "It is not covered by any document production request or subpoena duces tecum. The search that was conducted—" whereupon the district court interrupted (as shown by the dash) and stated "Okay. You have answered it." 6/4/92 Tr. 105. In addition, after conceding the responsiveness of the log during closing argument, petitioner twice unsuccessfully began to explain why the failure to produce it was not intentional. The first time, he began referring to Svede's deposition, whereupon the court stopped him (as again revealed by a dash in the transcript) and admonished him to "stick within the record," *id.* at 143, of the court hearings, of which the deposition had not been made a part. Petitioner later tried to explain that the document was "not withheld as a result of any trickery or improper motive," soon after which the Court stopped him again (as a dash in the transcript again reveals) and said "Okay. You have run out of time." *Id.* at 144.

At the close of the hearing, the court concluded that sanctions against the United States were warranted. That decision was based on two factors. First, the court stressed the issue of the timing of the government's responses, concluding that the "plaintiffs' ability to prepare for trial has been seriously disrupted because of the time that's had to be devoted by plaintiffs' counsel to matters related to the failure of defendant to timely answer the interrogatories and timely respond to the requests for production." *Id.* at 147. Second, the court concluded that "the government failed to obey" its May 26 order in failing to produce Svede's accident log. *Id.* at 148.

Based on these findings, the court concluded that sanctions under Fed. R. Civ. P. 37(d) were appropriate, and that Fed. R. Civ. P. 37(b) would also support sanctions. Accordingly, the court ordered conclusive findings of "designated facts" that established liability on the part of the United States, leaving only damages issues and affirmative defenses, if any, for resolution at trial.[8] App. 37a-38a. Trial on damages proceeded on June 9. The following day, the district court entered an order awarding damages totalling $892,567 and entered a final judgment.

c. On July 1, roughly 20 days after entry of final judgment, the district court, not yet aware of the existence of the Kunkel logs, entered an order indicating that it was concerned about possible misrepresentations petitioner might have made to the court regarding his knowledge of the existence of the Svede logs. The order indicated that the court was contemplating potential disciplinary actions against petitioner, including criminal contempt proceedings, disbarment, or sanctions under Fed. R. Civ. P. 11. *Id.* at 44a. The court indicated that, in lieu of a formal "show cause" hearing, it would give petitioner an opportunity to address these issues at a "preliminary hearing." *Id.* at 52a.

At this pivotal July 28 hearing, both petitioner, represented by private counsel, and Svede testified that the

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[8] The Department of Justice, on behalf of the United States and petitioner, filed a notice of appeal and sought emergency relief from the court of appeals after the conclusion of the June 4 hearing. This appeal concerned only the individual sanctions against petitioner and was prompted by the concern that execution by petitioner of the affidavit certifying that he had not, and would not, seek reimbursement of the $2500 sanction might preclude later appellate review. The court of appeals denied the relief, ruling that this order was not collaterally appealable. The court indicated, however, that "[e]xecution of the affidavit required . . . would not prevent AUSA Means or the government from challenging this rather harsh sanction order at the appropriate time." Order (5th Cir. filed June 8, 1992).

failure to produce the "Svede logs" had been the result of misunderstandings and not any intent to withhold relevant information. *Id.* at 71a-73a, 81a-82a. As both petitioner and Svede testified, the genesis of the problem was that there were *two* separate sets of logs—the Safety Office log maintained by Kunkel and the "Non-Vehicle Accident Register" maintained by Svede. Although petitioner had made numerous and exhaustive efforts to elicit all relevant information from Postal Service employees, Svede had neglected to mention the log until immediately before the afternoon hearing on June 4 when Svede arrived at the courthouse with the log. *Id.* at 66a-67a, 71a-72a, 81a-82a, 90a-91a. The Safety Office logs maintained by Kunkel contained no entries regarding the River Bend Post Office. *Id.* at 71a, 73a, 82a, 90a. Because, until the afternoon of June 4, petitioner believed the Kunkel logs to be the only logs in existence, he had stated to plaintiffs and to the court that morning that there were no logs responsive to the discovery requests, which were explicitly limited to accidents at the particular post office where Chilcutt was injured.

Svede confirmed that he failed to inform petitioner of the existence of the log. He explained that the log had become "rolled up in the file cabinet," and that he simply forgot about it. *Id.* at 64a. Svede explained that he kept a log of accident reports only as an index for use in locating information about an incident in the course of his duties. Because the Chilcutt file was already known to him, it never crossed his mind to check his logs to see if it was included on his indexes. It did not come "to mind" even when petitioner specifically asked about any logs in his possession until he made a final search in response to the court's order to appear to testify. *Id.* at 80a-81a.

Plaintiffs' counsel argued that Svede's statement in his deposition referring to "my log," and plaintiffs' discovery request, should have alerted petitioner to the existence of a separate Svede log. Petitioner explained, however, that

he understood those references solely in terms of Kunkel's logs. *Id.* at 83a-84a, 87a-88a. That was a reasonable assumption in light of Svede's testimony that Kunkel's logs were the only ones Svede had identified for petitioner. *Id.* at 71a-75a.

The district court stated at the close of the hearing that "Mr. Svede is basically being honest." *Id.* at 114a. Although the district court was openly skeptical that petitioner's actions were inadvertent, it nevertheless expressly held that it would give petitioner the "benefit of the doubt" and *not* pursue proceedings that could lead to criminal contempt charges or disciplinary action. *Id.* at 116a. That conclusion made sense because the personal accounts of petitioner and Svede concerning the events were completely consistent and thus it would be impossible to conclude that Svede was being truthful but petitioner was not.

After the hearing of July 28, the court entered a final order resolving the ethical/contempt charges intimated in the July 1 order. App. 53a-54a. The court stated that "whether the conduct was intentional or grossly negligent, entry of the following order would be appropriate," and ordered petitioner to attend 15 hours of ethics classes and pay plaintiffs' counsel $625 to compensate her for preparing for and attending the July 28 hearing, both at his own, and not government's, expense. *Id.* See also *id.* at 40a, 117a-118a.

Petitioner, in his capacity as the trial attorney, recommended appeal from the judgment against the United States. He also requested that the Department of Justice appeal on his behalf the court's order not to seek reimbursement of the monetary sanctions under 28 C.F.R. § 50.15(c)(1).

2. *Proceedings Before the Court of Appeals.* Both the United States and petitioner appealed from the final judgment and all orders of the district court and both were represented by the Department of Justice. Relying

upon the post-trial July 28 hearing and the express decision of the district court not to pursue a formal show cause hearing, the government argued that the lack of a finding of willful misconduct on the part of petitioner required the reversal of both the sanction against the United States and the injunction against reimbursement imposed upon petitioner. The government argued that, absent willful misconduct by its attorney, the court's decision to prevent reimbursement was an abuse of discretion. It further argued that, under the circumstances, the injunction constituted an unwarranted interference with the Executive Branch's conduct of litigation and its right to insulate its employees from liability incurred in the good faith performance of their duties, in violation of basic separation of powers principles.

The court of appeals affirmed the district court, but on a fundamentally different theory of the case. With respect to the government, the court of appeals ignored the district court's rationale for imposing the sanctions, which was the government's failure to respond timely to plaintiffs' discovery requests, 6/4/92 Tr. 146, 147, and its "fail[ure] to obey th[e] order" compelling discovery. *Id.* at 148. Instead, the court of appeals went beyond the findings of the district court, stating: "Because we conclude that the Government indeed flagrantly and willfully disregarded its discovery obligations and the district court's order, we need not decide what lesser standard of behavior would have justified the type of sanction ordered . . . ." App. 17a n.23.

The court made no effort to conceal the true nature of its undertaking on this issue. In the absence of findings of fact by the district court on this issue, the court of appeals expressly observed that its conclusion was based on "the credible evidence in the record of this case . . . ." *Id.* at 17a. With respect to the injunction against petitioner, the court of appeals similarly ignored the district court's only stated ground for prohibiting re-

imbursement, *viz.*, that taxpayers should not pay for the cost of a motion to compel discovery from the government. Based on its prior finding of willful misconduct with respect to the sanctions against the government, and recharacterizing the district court's orders sanctioning petitioner as designed to "punish Mr. Means for his flagrant disregard of his discovery obligations," the court of appeals held that the sanction imposed upon petitioner by the district court was appropriate.[9] *Id.* at 18a. As for the separation of powers argument, the court of appeals declared that in a case of willful misconduct it would violate separation of powers principles to "restrict a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch." *Id.* at 27a (emphasis omitted).

In response to the panel's opinion, the Department of Justice filed a petition for rehearing (which is reproduced in the appendix to this petition (*id.* at 121a-133a)) on behalf of the United States and petitioner in which it argued that the panel "has seriously misapprehended some of the pivotal facts of this case." *Id.* at 121a-122a. The petition then catalogued the factual errors and explained in detail precisely how the record demonstrably diverged from the panel's conclusions. The petition was denied without comment. *Id.* at 55a.

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[9] There seems little doubt that the court of appeals' perception of the record significantly influenced its decision. Not only was the court increasingly inflammatory throughout its opinion in its characterization of petitioner's conduct, but the court also ordered the government to pay "all costs and attorney's fees" for the appeal to the appellees. App. 29a. The court stated no basis or justification for imposing that order. Such an extraordinary order certainly could not have been justified on the basis of the legal issues actually presented on appeal, as opposed to the misconduct issue decided by that court. *See id.* at 17a-18a. Moreover, 28 U.S.C. § 2412 expressly excludes Federal Tort Claims Act cases from attorney's fees awards even where the Government's position is not "substantially justified."

REASONS FOR GRANTING THE PETITION

This is not an ordinary petition for certiorari. Petitioner is an Assistant United States Attorney whose appeal raised a fairly straightforward legal issue of whether the district court had the authority to bar him from seeking reimbursement, pursuant to Department of Justice policy, of discovery expenses he was ordered to pay pursuant to Fed. R. Civ. P. 37(d). The appeal was authorized by the Solicitor General presumably because the issue is one of some recurring significance and because there is appellate authority for the proposition that courts should not intrude upon the attorney-client relationship by interfering with their arrangements regarding the payment of monetary sanctions. See *Blue* v. *Department of the Army*, 914 F.2d 525, 549 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).[10] The United States also had a perfectly respectable legal argument that, at least absent willful misbehavior, separation of powers concerns should limit a district court's discretion to intrude into the relationship between a government attorney and the Department of Justice. Neither the government nor petitioner could reasonably have anticipated, however, that petitioner's professional reputation would be irreparably harmed by an appellate court making findings of fact that not only were *not* made by the district court, but also partly contradicted the ultimate findings of the district court without any suggestion that the district court's view was clearly errone-

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[10] In *Blue*, the Fourth Circuit disapproved a district court's injunction, coupled with a Rule 11 monetary sanction, barring an attorney employed by the NAACP, which had provided counsel for the plaintiff's case, from seeking reimbursement from the NAACP. Petitioner's case for why the courts ought not to interfere with the attorney-client relationship is, if anything, stronger than was the case in *Blue*. Petitioner is not just an attorney enjoined from seeking reimbursement from his client, but rather is a government employee enjoined from utilizing established procedures for seeking indemnification for liability incurred in the good faith performance of his duties.

ous. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

To be sure, this Court ordinarily does not sit to review errors committed by courts of appeals, and petitioner recognizes that the Court routinely denies certiorari when the only argument is that the decision below conflicts with a decision of this Court. But the problem posed by the court of appeals' decision in this case is of such profound importance both to the individual attorney involved and to United States government attorneys in general, and the court of appeals' departure from established procedural norms was so egregious, that the Court should depart from its usual approach and correct this error summarily.

1. There can be no question that the court of appeals committed a grevious error by assuming the role of fact-finder in this case. It is axiomatic that appellate courts should not make factual findings *de novo*. This Court recognized the principle most recently in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. at 713-14. There, the Court vacated the judgment of the court of appeals with the plain observation that "it should not simply have made factual findings on its own." *Id.* at 714. Indeed, appellate fact finding may well exceed the jurisdiction conferred by 28 U.S.C. § 1291, covering "appeals from all final decisions of the district courts." See also *Singleton* v. *Wulff*, 428 U.S. 106, 119-20 (1976). The district court here entered no "decision" finding that petitioner knew of the Svede log and no conclusion that he willfully concealed evidence, lied, or was contumacious.

Moreover, there are recognized risks inherent in appellate fact-finding. See *United States* v. *Best*, 939 F.2d 425, 431-32 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992). In *Best*, the Seventh Circuit en banc noted that the panel that originally decided the appeal had engaged in unwarranted fact-finding in concluding that an Assistant United States Attorney was guilty of misconduct. That finding was vacated, with the observation by

the en banc court that "we should not perform that [fact-finding] task in [the district court's] stead." *Id.* at 432 n.3. See also *United States* v. *Tarricone*, No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994), (vacating panel's previous prosecutorial misconduct findings and remanding issue to district court). In sum, the proposition is unassailable that a court of appeals exceeds its authority by affirming a judgment based on factual findings not made by the district court.

2. This case was litigated in the court of appeals on the reasonable assumption that it was not a case involving counsel's willful misconduct, because the district court had expressly refused to find willful misconduct on the part of petitioner. Indeed, even plaintiffs' counsel, in interpreting the trial judge's references to "government" withholding of the Svede log, argued that the district court found that "calculated withholding of documents" was undertaken by "Al Svede/Robert Kunkel/Iona Smith." Brief for the Appellees at 7 (5th Cir. filed Jan. 25, 1993). Plaintiffs did not argue that petitioner was involved in any willful misconduct.[11] Thus, even at the reply brief stage in the court

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[11] Appellees below did argue that the sanction against the United States—the conclusive findings establishing liability—was justified by the willful misconduct of the government in general. But that argument was based on the failure of the postal employees to provide information to petitioner so that it could be supplied to the plaintiffs. That issue is not before this Court.

Appellees below also argued that petitioner failed to exercise "diligence" in complying with discovery deadlines. Petitioner does not quarrel with that characterization. He readily admits that he erred badly in failing to attend to discovery deadlines, and at least in not seeking an enlargement of time. For this reason he has not challenged the basic sanction imposed upon him. But he does challenge the reimbursement injunction because it provides him with a concrete injury that allows him to challenge the Fifth Circuit's injury to his reputation. *See Sullivan* v. *Committee on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1967) (appeal of misconduct determination by grievance committee, imposing no sanction due to first-impression nature of case); *Fromson* v. *Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir. 1989) (appeal allowed in civil action where

of appeals, petitioner had no reasonable basis for anticipating that the court of appeals would summarily conclude that he engaged in reprehensible misconduct. This was not the regular procedure to which an attorney accused of misconduct is ordinarily entitled. See *In re Ruffalo*, 390 U.S. 544 (1968).

In addition to being procedurally infirm, the court of appeals' factual findings are not supported by the district court record. The district court failed to make a finding of intentional wrongdoing, and instead gave petitioner "the benefit of the doubt." App. 116a. The district court, unlike the panel below, had imposed the sanction against petitioner on the theory that he had not acted properly in response to his discovery obligations and that taxpayers should not pay for his mistakes. *Id.* at 40a. If the court of appeals had simply affirmed on those grounds, petitioner would disagree, but would not stand accused and summarily convicted of egregious misconduct.

Rather than reviewing the case based upon the factual findings of the district court, however, the court of appeals undertook its own review of what "the credible evidence in the record of this case reveals" and then excoriated petitioner for "intentionally withh[olding] documents" and making "blatant misrepresentations to the district court." *Id.* at 17a-18a. Those factual observations are both incorrect and inflammatory. What is more, the district court—which had the opportunity to view the demeanor of the witnesses and petitioner first-hand—declined to make such findings. Finally, the court of appeals expressly questioned Svede's credibility (App. 19a) in the

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reputation damaged). If this Court corrects the court of appeals' error in engaging in appellate fact-finding, on remand petitioner will have an opportunity to have the propriety of the no-reimbursement injunction decided on the terms that formed the basis for the district court's decision—that the taxpayers should not pay for the mistake of a public servant handling a case load that exceeded 100 cases.

face of the district court's finding that Svede was "basically being honest." *Id.* at 114a. It bears repeating that both Svede and petitioner testified unequivocally that Svede *never* told petitioner that his logs existed—despite repeated inquiries by petitioner whether *all* relevant documents had been located and produced—until the lunch break at the June 4 hearing. The district court expressly credited Svede's testimony, and it is simply impossible to conclude that Svede was *not* lying, but petitioner was.

Treading where the district court declined to go, the court of appeals committed precisely the kind of mistake that justifies the absolute rule against appellate fact-finding. The court of appeals utterly failed to recognize the confusion that existed between the Svede logs and the Kunkel logs—an ironic mistake in light of the fact that the reason the Svede logs were not initially produced was petitioner's original lack of knowledge that there were two sets of logs. The court of appeals stated, for example, that "[d]uring that hearing, Mr. Means again claimed that although Mr. Svede possessed an accident log, it was not covered by the plaintiffs' requests for production." *Id.* at 7a & n.12. The transcript passage that the court quotes, however, was from the hearing in the morning of June 4, where petitioner was describing the Kunkel log—the only log of which he was aware—not the Svede log. See *supra* pp. 7-8.[12]

Similarly, the court made an outright mistake in its description of the content of the Svede log, which perhaps

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[12] To be sure, petitioner failed adequately at the afternoon hearing of June 4 to explain the problem when he initially stated that the log was not responsive, so that the failure to have produced it would have been immaterial. Petitioner's response, however, was in part due to his desire to avoid embarrassment to Svede and to protect his client, the United States, from being sanctioned for Svede's actions. Moreover, as shown above (*supra* pp. 9-10), on three separate occasions during that hearing, petitioner attempted to explain that he had previously been completely unaware of the Svede logs, but the district court cut him off brusquely. 6/4/92 Tr. 140, 143, 144.

explains the court's vehement rhetoric. The court of appeals stated that "the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office," and that "[t]his log apparently contained information about remedial actions taken by the USPS in response to Ms. [Chilcutt's] accident, as well as information on other accidents which occurred at the River Bend location." App. 16a & n.21; *id.* at 5a & n.6. These statements are completely and demonstrably wrong. The Svede log is reproduced in its entirety in the appendix (*id.* at 120a) and even a cursory inspection of the document shows that it contains no other River Bend entries and it says nothing about remedial actions. It is simply inexcusable that the panel refused to acknowledge its error—at the cost of petitioner's professional reputation—when the Department of Justice demonstrated the facts in a respectful and measured petition for rehearing.

Moreover, if the court of appeals had examined the logs, it would have been plain to the court that there was never any intentional misconduct by petitioner (or anyone else). No rational person would risk serious sanction by withholding this document—especially in view of the district court's obvious pique at the shortcomings in the government's discovery performance in the case—while at the same time disclosing hundreds of other documents that were at least as relevant and presumably more damaging to the government's case. This is not a case where a "smoking gun" document has been concealed.[13]

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[13] The court of appeals also found that "the same contractor cleaned all of the post offices in the Fort Worth area . . ." (App. 4a n.5) which, if true, might make the Svede log marginally more important. But as the petition for rehearing filed by the United States in the court of appeals makes plain, "the district court made no such finding, and indeed there is no evidence in the record that would bear out such a finding." *Id.* at 125a. The government also pointed out that the cleaning contractor worked at none of the other sites mentioned in the Svede log. *Id.* at 125a-26a. Again, the panel simply chose not to correct its manifest factual error.

This is a case where an innocuous document was not disclosed in timely fashion. The lack of timely production may justify a sanction under Fed. R. Civ. P. 37(d), but it does not justify interfering with a government lawyer's right, pursuant to Department of Justice policy, to seek reimbursement of the sanction, and it certainly does not justify pillorying an Assistant United States Attorney with an otherwise unblemished professional record.

Finally, the court of appeals went awry in relying upon the nonproduction of the supposed Form 1769 as a further instance of misconduct. *Id.* at 9a & n.13. As noted above, the testimony presented on the issue whether such a form existed was directly in conflict, and the district court not only declined to make express findings on this point, but also did not even mention it in its discussion as to why sanctions were appropriate.

The court of appeals addressed this factual issue entirely on its own, and rested its conclusion exclusively on one portion of Mr. Svede's testimony. Characterizing the government's argument, even on appeal, that the form did not exist as "quixotic," the court nonetheless felt free completely to ignore the testimony of the responsible federal employee, Iona Smith, that no such form was created, and it ignored Svede's own subsequent statements that cast doubt on his initial recollection. Unquestionably, a district court that observed the testimony of Svede and Smith might be in a position to reach that conclusion, but a court of appeals plainly is not entitled to resolve that issue based upon credibility judgments made on a limited portion of the cold paper record. *Id.* at 17a. This was manifestly improper. Moreover, even if Smith were mistaken and even if Svede did at one time see a Form 1769 filled out by Chilcutt, there is *no* evidence in the record even hinting that petitioner had any knowledge of the existence of such a form. The court of appeals nonetheless blithely stated that "Mr. Means presented *no* explanation for his misrepresentation" regarding Form 1769. *Id.* at 9a n.13.

3. The court of appeals committed a profound error in substituting its own fact-finding for that of the district court. That decision cannot be squared with *Icicle Seafoods* or with *United States* v. *Best*. But petitioner recognizes that this is not the kind of a case that traditionally warrants plenary review by this Court. Certainly the error in this case is not the type that this Court grants certiorari to hear and decide on a plenary basis. Rather, the decision below embodies the kind of error that is so manifest that it should be corrected summarily. Given the immediate and dramatic effect of this error on petitioner and its far-reaching effects on government attorneys, the error below deserves correction. Because this Court is the only forum in which that error can be corrected, the Court should grant the petition, summarily vacate the judgment and remand for further proceedings.[14]

With respect to the immediate injury, the harm to petitioner's reputation if the court of appeals' opinion stands as the final word is inestimable and irreparable. As one court of appeals observed, "published opinions chastising [counsel] by name" constitute a "serious sanction."[15]

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[14] By substituting new facts for the reasoning of the district court, the court of appeals avoided deciding the difficult issue whether it is an abuse of discretion for a district court to interfere with the Executive Branch's litigation decisions, at least absent willful misconduct by the government's attorney. On remand, the court of appeals would be free to uphold the sanction on the theory advanced by the district court that taxpayers should not pay for government lawyer mistakes. Of course, it could reverse the district court's holding as well. Alternatively, the court of appeals could remand to the district court to clarify whether that court would make a finding of willful misconduct to uphold the injunction against reimbursement on that basis. If the former, then petitioner's professional reputation will have been restored; if the latter, then petitioner will have an opportunity to prove before a trier of fact that his error was not intentional. *See infra* p. 24.

[15] This is not to endorse that approach to sanctioning counsel. To the contrary, beyond monetary sanctions for procedural violations, attorney discipline is best conducted under procedural safeguards established for that purpose.

United States v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). Petitioner stands convicted of a flagrant violation of his professional responsibilities, but has never been given any meaningful opportunity to present his side of the story—apart from the July 28 hearing, after which the district court entered an order disposing of the matter while expressly declining to resolve the question of intentional misconduct. App. 53a-54a. This is because the court of appeals committed its factual errors based on its own evaluation of the record, which was different from the evaluation of the district court, of the government as appellant, and even of the appellees. No one had found or argued that petitioner acted willfully. For the court of appeals to make such a finding and to vilify petitioner under these circumstances is fundamentally unfair.

It is this process that provides the compelling reason why this Court must act. Appellate fact-finding deprives the injured litigant of the opportunity to have an appeal as of right, which otherwise is guaranteed by 28 U.S.C. § 1292. If the appellate court (as the panel did here) finds its own facts to support the judgment of the district court, then the district court proceeding is rendered superfluous. The decision of the court below is fundamentally at odds with this Court's analysis in *Sacher* v. *United States*, 343 U.S. 1, 12-13 (1952), that "[t]he profession knows that no lawyer is at the mercy of a single federal trial judge . . . before punishment takes effect he may have an appeal on law *and fact*." (Emphasis added.) Only review by this Court can vindicate this bedrock principle that a lawyer "at the mercy of a single" court is entitled to one level of meaningful appellate review.

4. Finally, although petitioner's situation is compelling, the need for the Court's intervention in this case should not be measured solely in terms of his plight. The impact of the decision below on federal government attorneys has been widespread and profound. More than 450

government attorneys from all across the United States contacted the Attorney General—not at petitioner's behest—to urge the Department of Justice to support petitioner's efforts to have this decision overturned. Their concern reflects their belief that an attorney's professional reputation is his or her lifeblood, and that a government attorney should be protected from the kind of appellate fact-finding engaged in by the court of appeals here.[16]

More fundamentally, the decision of the court of appeals will distort the appeals recommendation process for the federal government. That process assumes that fact-finding will be done exclusively by the district court and thus provides the government with a clear frame of reference for resolving the often difficult decision whether to seek appellate review of an adverse decision.

This case reveals plainly how that process will be distorted by appellate fact-finding in any situation where there has been a charge of attorney misconduct that the district court seriously entertains—even if it does not conclude that misconduct occurred and a sanction is warranted. The district court's decision to enjoin petitioner from seeking reimbursement from the United States rested

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[16] Government lawyers justifiably feel somewhat beleaguered by recent instances of appellate fact-finding. The *Best* case and the *Tarricone* decision are good examples of appellate courts reaching out to take gratuitous swipes at government counsel's conduct. *See also United States* v. *Ofshe*, 817 F.2d 1508, 1516 n.6 (11th Cir.) (gratuitously labeling the prosecutor's conduct "reprehensible" without any similar finding by the district court), *cert. denied*, 484 U.S. 963 (1987). Fortunately, the first two actions were corrected by the lower courts on rehearing, but not without first creating a stir among government lawyers generally. In this case, the Fifth Circuit has declined to correct its error—despite the petition for rehearing demonstrating those errors—placing the burden of protecting the professional reputation of government lawyers on this Court. The court of appeals' improper conduct has generated widespread interest among government lawyers and lawyers in general, and we understand that a number of *amicus* briefs will be filed in support of this petition.

solely on the desire to insulate federal taxpayers from assuming the costs of petitioner's lack of diligence. That ruling, as well as the ruling ordering sanctions against the United States due to the government's failure timely and fully to comply with its discovery obligations, presented clean legal issues that petitioner recommended should be appealed and that the Solicitor General concluded were suitable for appeal. In any case in which sanctions are an issue, however, the dynamics of that process will inevitably be affected by the court of appeals' decision in this case.

If government attorneys must henceforth consider that their reputations may be jeopardized by appellate fact-finding in the context of reviewing a separate legal issue, neither the interests of the United States, its lawyers, nor the legal system generally, will be served. On the contrary, the risk of appellate fact-finding squarely threatens to present a conflict of interest between the lawyer's duty to represent his client and his basic interest in self preservation. The United States certainly will not be well-served by having its agents' decisions be influenced by such intensely personal considerations. It will be impossible for the United States, through the Solicitor General, to weigh the costs and benefits of appeal in any case in which charges of attorney misconduct are involved if the government cannot proceed on the assumption that the factual record is settled.[17] And as this Court has recognized, it is in the interest of the federal courts for the government's appeals recommendation process to function effectively without being unduly distorted by considerations extraneous to the traditional factors that go into determining whether the government should appeal a case.

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[17] We recognize, of course, that the factual findings of a district court are subject to appellate review on a clearly erroneous standard. *See* Fed. R. Civ. P. 52(a). That circumscribed review, however, is a far cry from what occurred here, where nobody at any point has suggested that the district court's factual findings, or lack thereof, were clearly erroneous.

See *United States* v. *Mendoza*, 464 U.S. 154, 160-61 (1984).

Petitioner readily admits he made mistakes and he regrets them. But he is not the villain described by the court of appeals and the findings necessary to make him that villain were the product of a deeply flawed process that this Court has condemned. There is no basis in either the law or the record for the appellate fact-finding undertaken by the court of appeals in this case. That error may not warrant plenary review by this Court, but it most certainly warrants review and correction both for petitioner and for the hundreds of government attorneys who know that "there but for the grace of God, go I."

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

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